IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No......

DANIEL LUMBER COMPANY, ET AL, PETITIONERS,

vs.

EMPRESAS HONDURENAS, S.A., RESPONDENT.

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief For Respondent In Opposition

REPLY TO JURISDICTIONAL STATEMENT

The only ground upon which Petitioners claim that the Supreme Court should take jurisdiction is set out on page 2 of the petition, Petitioners claiming that the Court of Appeals in affirming the judgment of the District Court has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a Trial Court as to call for supervision by the Supreme Court of the United States.

The facts in this case are fully set out in the opinion of the Court of Appeals to be found as Exhibit A to the petition (in the first paragraph there is a typographical error; 32,000,000

acres should be 32,000 acres), and will not be repeated here except to call the Court's attention to the fact that this is a suit on a simple contract of sale; that Petitioners operated under the contract of sale for well over a year after acquiring definite knowledge as to the amount of timber on the land, cutting millions of board feet of lumber, and although during the course of such operation definitely promising Respondent payment for lumber cut, Petitioners never paid one cent at any time during or after the cutting of the timber.

Respondent therefore submits that as shown in detail by the opinion of the Court of Appeals this is merely a case in which well established principles of law have been correctly applied rather than any departure from the accepted and usual course of judicial proceedings.

Petitioners present only two questions for review, designated as A and B.

RESPONDENT'S REPLY TO A

Petitioners take the position that Respondent undertook to sell Petitioners at least 30,000,000 board feet of standing pine timber. Such was not the case. The agreement was had at a meeting in San Antonio, Texas, between Petitioners and the directors of Respondent. None of the directors, with one exception, had ever seen the land, and he was not present at the San Antonio meeting, and none of the directors knew and none of them had been told how much pine timber was on the land (R. 248). Petitioners told the directors of Respondent that Petitioners had inspected the timber, that they had been into the property in a jeep, and had flown over it several times (R. 244). At the San Antonio meeting Petitioners told the directors of Respondent that there was a minimum of 80,000,000 feet (R. 248, 1165). While the terms of the contract were geared to the representation made by Petitioners to Respondent, there was no covenant in the contract whereby

Respondent agreed or represented that there was any definite amount of timber on the land, nor was there any warranty express or implied, to that effect.

The jury found that Petitioners undertook to make an independent inspection as to the amount of acreage of pine timber and the quantity of pine timber prior to the execution of the contract (Special Issue #8-a, R. 1214). The jury further found that by a proper inspection of the extent of pine timber prior to the execution of the contract there would have been revealed to a person making such inspection that there was materially less than 32,000 acres of pine timber and materially less than 75,000,000 board feet of lumber thereon (Special Issue #10, R. 1215).

Charles H. Daniel, Jr. testified that as early as February 1948 he had learned the approximate extent of the timber (R. 827). After Petitioners learned the extent of the timber they constructed their mill and placed it in operation in May 1948, some three months after they had learned the extent of the timber (R. 803) and continued to operate until February or early part of March, 1949 (R. 829). In other words, when Petitioners learned in February 1948 that there were less than 30,000,000 board feet of timber on the land, instead of electing to rescind the contract on the ground of mutual mistake, they elected to affirm the contract and operated under the contract for more than a year, cutting several million feet of lumber.

Petitioners never made any payment except the original deposit made when the contract was signed (R. 842), and it was not until eighteen (18) months after Petitioners went into the property and started cutting timber that they made any complaint to Respondent regarding a shortage of timber or that the estimate that Petitioners had made had been too low or anything of that nature (R. 254-5). It is, of course, elemental that Petitioners could not, with full knowledge of the facts, affirm the contract and avail themselves of its

benefits to the extent of cutting and selling several million feet of lumber without assuming the burdens of the contract and being bound by its terms.

RESPONDENT'S REPLY TO B

Petitioners filed a cross action for $282,417.25 damages alleging that if the timber had been available as represented by Respondent they would have been able to cut a minimum of 30,000,000 board feet (R. 35). Such cross action was the basis of the issue being submitted to the jury as to whether there were 30,000,000 board feet. In answer to Special Issue #11 the jury found that the Petitioners were not damaged by the failure of Respondent to deliver to Petitioners the 30,000,000 board feet contemplated by the contract (R. 1215-6). Nowhere in their answer did Petitioners allege the invalidity of the contract by virtue of any impossibility of performance by reason of the shortage of timber. Had it been Petitioners' position that it was impossible for them to perform the contract during the first year by virtue of there being less than 6,000,000 board feet of timber on the land, it was incumbent upon them to plead this defense under Rule of Civil Procedure 8-c. It was not pled, it was not an issue in the case, and the facts were not developed except incidentally, but as developed incidentally the evidence showed that there were more than 6,000,000 board feet on the land.

One of the Petitioners testified that their mill normally ran about 20 to 25 days a month; that they would cut from 500,000 to 600,000 feet a month and that the mill was in good operation at the time he was in Honduras (R. 935). Petitioners admitted that the mill was placed in operation in May 1948 (R. 803 and 828), and continued to operate until February or early part of March, 1949 (R. 828-9).

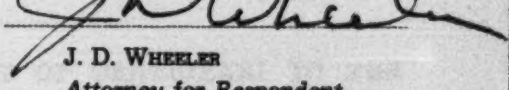
Taking the period from May 15, 1948, to March 1, 1949, and figuring the 600,000 board feet per month would give a

total of 5,700,000 board feet actually processed into lumber. A witness for Petitioners testified that at the time Petitioners quit cutting there were between 1,250,000 and 1,500,000 board feet of timber on the land still standing (R. 980). This in addition to 175,000 board feet of logs cut and lying in the forest.

Had the issue been in the case, which it was not, this evidence which came into the record incidentally would have supported a finding that there were considerably more than 7,000,000 board feet of timber on the land.

In addition to the references to the record set out in this Reply, the recitals of fact in the opinion of the Court of Appeals constitute a complete answer to all of Petitioners' contentions.

Respondent respectfully submits that the petition for writ of certiorari should be denied.



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